Verne, B. Michael 801.1(g)

From: [redacted]
Sent: Friday, June 01, 2007 2:25 PM
To: Verne, B. Michael
Subject: Cash tender offer question

Hi, Mike -

I haven't talked to you in a while and I hope you are well. I have a question about cash tender offers. We have a situation in which a foreign company is acquiring the voting securities of a foreign issuer through open market purchases on a foreign exchange. The transaction may be subject to HSR filing requirements, not eligible for the 802.51 exemption. In the event this transaction is reportable, I am trying to determine whether it would be subject to treatment as a "cash tender offer" under 801.1 (g)(2), given that it is a tender offer (in the generic sense) and the consideration is all cash. The problem I see is that the foreign cash tender offer might not be considered a "tender offer" under 801.1(g)(1), which specifies that it must meet the definition of section 14 of the Securities Exchange Act of 1934, 15 U.S.C. 78n. As it is a foreign open market purchase transaction, it would not seem to meet the SEC definition.

So my question is whether the definition of "cash tender offer" in 801.1(g)(2) is intended to reach generically all tender offers with cash as the consideration, or whether an element of this definition is that the tender offer be made only on a U.S. exchange.

Thanks,

[redacted]

[redacted]

FOREIGN TENDER OFFERS CAN QUALIFY.
BV
6/1/07

802.65

Verne, B. Michael

From: [redacted]
Sent: Friday, June 01, 2007 4:05 PM
To: Verne, B. Michael
Subject: Request for Informal Interpretation - 802.65

Dear Mr. Verne:
We would appreciate your confirmation of the applicability of the exemption in Sec. 802.65 to the following transaction.

An existing LLC is currently owned by "B". B seeks a cash investment by Investor "A". A will make a cash-only capital contribution in the LLC in exchange for Class A membership units. Subject to the provisions of an Amended LLC Agreement, these units will entitle A to receive 95% of profit allocations until a "Flip Point" is achieved. The Flip Point is defined as the date of realization of a calculated rate of return for A (together with the satisfaction of certain debt obligations by the LLC to a third party) or the later of the tenth anniversary of the capital contribution or the date that calculated rate of return is realized, whichever comes first. After the Flip Point, A will no longer control the LLC within the meaning of Sec. 801.1(b)(1)(ii), i.e., it will have no right to 50% or more of either profit distributions or assets allocated upon dissolution.

Because (i) A is contributing only cash to the LLC; (ii) the purpose of the transaction is to provide for a cash investment by A in the LLC (i.e., financing); and (iii) the terms of the Amended LLC Agreement are such that A will no longer control the LLC after it realizes its preferred return (or with the lapse of time), we believe that A's acquisition of a membership interest in the LLC is exempt under Sec. 802.65.

Please let us know if you concur with this analysis.
Thank you,
[redacted]

[redacted]

Agree
BMV
6/4/07

2

7A(c)(1)

Verne, B. Michael

From: [redacted]
Sent: Friday, June 01, 2007 4:52 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: Ordinary Course of Business Exemption

We seek confirmation that the proposed transaction described below is exempt from the notification and waiting period requirements of the HSR Act by virtue of Section 7A(c)(1) of the Act and Section 802.1 of the FTC Premerger Notification Rules, which cover transactions in the ordinary course of business (OCB Exemption). Pertinent facts are as follows:

1. Seller (which includes the ultimate parent entity and its controlled affiliates) is a diversified commercial lender that provides a variety of financing and equipment financing services throughout the United States and elsewhere. Seller's equipment financing subsidiary (the *Applicable Subsidiary*) proposes to sell substantially all of the assets associated with a business unit engaged in originating, marketing, purchasing, selling, and servicing equipment loans, leases, and other finance products for the construction industry, including its portfolio of financing contracts, loans, and equipment leases for that industry.

2. Seller, through the Applicable Subsidiary) provides similar services for customers in a variety of other industries, and will continue to do so following closing of the proposed transaction.

However, Seller will discontinue such services, at least during the term of a restrictive covenant currently being negotiated as part of the proposed transaction, (the *Restriction Period*) as a primary business for customers in the construction industry. It is possible that Seller may provide limited equipment loans, leases, and other financial products for the construction industry during the Restricted Period, but the restrictive covenants are anticipated to limit those activities to a minimal degree which would be incidental to Seller*s continuing provision of financial services primarily focused on other industries. It is anticipated that any construction industry-related activities during the Restricted Period would represent a de minimus percentage of Seller*s equipment financing assets and revenues. Any restrictions on Seller would cease at the end of the Restriction Period.

3. The assets to be sold comprise less than five percent of Seller's total loan/lease portfolio.

4. Purchaser is a diversified national lender that provides a wide range of commercial and consumer financial services.

5. Seller and Purchaser exceed the size of person tests, and the total purchase price for the transaction, stated as a cash premium over the net book value of the assets to be acquired, exceeds the minimum size of transaction threshold.

6. Purchaser will hire substantially all of Seller's staff (approximately 230 persons) who work in the business unit whose assets will be sold, but Seller will continue to employ many other staff who perform similar financing, lease financing, and servicing functions for Seller's commercial financing business units focused on other industries.

Based on the above statement of facts, the proposed transaction is covered by the OCB Exemption because Seller will continue to provide financing, lease financing, and loan servicing services for customers in a variety of industries following the sale of substantially all of its assets associated with Seller's business unit focused on the construction industry. We believe this is the case due to the nature of the loan/lease financing services that the Seller and its Applicable Subsidiary provide, even if in the context of other products or services the business unit in question might be characterized as an *operating unit* as that term is used in the OCB Exemption. See, e.g., ABA Section of Antitrust Law, Premerger Notification Practice Manual (4th ed. 2007), Interpretation 8; Informal interpretations 0411006, 0308001, and 0306007, published on FTC website, available at http://www.ftc.gov/bc/hsr/informal/index.shtm.

Please respond to all recipients of this email, or advise if you wish to discuss this matter and I will contact you by telephone w ith Mr. [redacted]

I AGREE ALL OF THIS IS COVERED BY THE ORDINARY COURSE EXEMPTION.

6/4/07

Best regards, [redacted]

FEDERAL TAX NOTICE:
Treasury Regulations require us to inform you that any federal tax advice contained herein (including in any attachments and enclosures) is not intended or written to be used, and cannot be used by any person or entity, for the purpose of avoiding penalties that may be imposed by the Internal Revenue Service. In addition, we do not impose upon any person or entity to whom this is addressed any limitation on the disclosure of the tax treatment or tax structure of any transaction discussed herein (including in any attachments and enclosures).

[redacted]

June 4, 2007

802.4

Michael B. Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th Street & Pennsylvania Avenue, NW
Washington, D.C.

Re: Exemption for Acquisition of Voting Securities of Registered Investment Company

Dear Mr. Verne:

[redacted] (the Partnership) owns approximately 9% of the voting shares of [redacted] (the "Trust") which are currently valued at approximately $30 million. The Trust is an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940. The Trust's SEC filings are available at [redacted]

The Trust's assets consist entirely of investment securities (none of which to our knowledge exceeds 15% of the voting power of any issuer) which were acquired in the ordinary course of business and that it holds solely for the purpose of investment. Thus, the Trust's acquisitions of voting securities appear to be exempt from the requirements of the Hart-Scott-Rodino Act by virtue of section 802(b) of the Act.

Please confirm that section 802.4 of the Rules exempt acquisitions by the Partnership of any amount of the Trust's voting securities. If you have any questions about this matter, please do not hesitate to contact us. Thank you.

Very truly yours,

[redacted]

AGREE
6/14/07

[redacted]

802.2

[redacted]

CONFIDENTIAL

VIA ELECTRONIC MAIL

June 5, 2007

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
7th & Pennsylvania Avenue, NW
Washington, DC 20580

Dear Mike:

I am writing to confirm my understanding of a telephone conversation we had on May 23, 2007 relating to the applicability of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act") to proposed transactions.

Proposed Transactions

Company A will purchase all of the stock of Company B for less than $59.8 million cash. The employees of Company B (physicians) will be offered the opportunity to sign employment agreements containing a non-compete and a commitment to stay for at least three years (the "Employment Agreements"). Those that sign will receive one-time payments made upon commencement of employment ranging from $50,000 to $125,000, depending on how long their tenure was at Company B and the length of time the physician commits to remain employed with Company A (either three or five years). Those that do not sign may stay under their present employment agreements without any additional cash payment. Both shareholder and non-shareholder employees will be offered the chance to sign new employment agreements and receive a cash payment as an incentive for remaining with Company A. The form of non-compete, which is part of the agreements, is very standard in the industry and the states in which Company B operates.

In addition, certain physicians who have signed the Employment Agreements and commit to stay ten years with Company A will receive, after their tenth year, an amount equal to up to a certain percentage of their compensation (the "Ten Year Payments").

[redacted]

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The real estate leased and utilized by Company B for its business ("Real Estate") will not be sold at the time of the initial transaction. Company A will assume the leases of Company B for the Real Estate ("Leases"), but will not pay any premium for the Leases.

Company A also will assume bank debt of Company B ("Third Party Debt") as a part of the transaction. Further, Company A will assume the obligation for deferred compensation owed by Company B ("Deferred Compensation"). The Deferred Compensation is a largely unfunded retirement benefit that the physician employees of Company B receive upon retiring after a certain age. Company B has been paying this deferred compensation for a number of years as part of the ongoing operations of Company B.

The Real Estate is owned by three separate partnerships made up of different groups of physicians associated with Company B. There is no person or entity with the right to half or more of the profits or the right to half or more of the assets upon dissolution of any of the three partnerships. Accordingly, each partnership is its own ultimate parent entity. Each partnership will have a put option to sell, and Company A will have a call option to buy, Real Estate in 2008 or later.

Conclusions

With these facts, in our particular scenario, we understand that neither the initial payments under the Employment Agreements or the Ten Year Payments comprise part of the value for the stock of Company B. Further, we understand that the taking over of the Leases, the assumption of the Third Party Debt, and the taking on of the Deferred Compensation obligation (whether this is treated as the assumption of a liability or not) also would not impact the transaction valuation for HSR purposes. Accordingly, as the transaction is the acquisition of the voting securities of a non-publicly traded corporation, Company B, with an established purchase price, the value of the transaction for HSR purposes is simply the cash purchase price of less than $59.8 million. See 16 C.F.R. § 801.10(a)(2)(i). Accordingly, you confirmed that the acquisition by Company A of the stock of Company B is HSR exempt.

We understand that the possible subsequent acquisition of Real Estate does not impact the conclusion that the initial transaction is HSR exempt. Much of the Real Estate consists of physician office buildings. While Company A would at the time of the acquisition of Real Estate already own the businesses conducted in the office buildings, the office buildings would be acquired pursuant to a separate acquisition from the acquisition of Company B and would be made from different ultimate parent entities. In evaluating the potential HSR reportability of the possible future acquisition of Real Estate, you confirmed that the office building exemption under 16 C.F.R. § 802.2(d) would apply to the office building parts of the Real Estate.

[redacted]

[redacted]

* * *

Please let me know as soon as possible if you disagree with any of the conclusions discussed above, or if I have misunderstood any aspect of your advice. Thank you for your assistance in this matter.

Sincerely,

[redacted]

AGREE
6/5/07

[redacted]

Verne, B. Michael 801.10

From: [redacted]
Sent: Tuesday, June 05, 2007 4:27 PM
To: Verne, B. Michael
Subject: Follow Up

Dear Mike,

I am writing to confirm my understanding of a telephone conversation we had on Monday, May 21, 2007 concerning the non-reportability under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act") of the proposed transaction described below.

Proposed Transaction

Buyer currently holds approximately 19.6 million shares of common stock of the Company ("Common Stock") with a current fair market value of approximately $29 million. Buyer also currently holds warrants to purchase an additional approximately 16.9 million shares of Common Stock ("Warrants"). The Warrants have an exercise price of $0.01 per share, do not have voting rights and have generally been acquired for a purchase price equal to the value of the Company's Common Stock less $0.01 (the exercise price of the Warrants). The Common Stock and the Warrants are not publicly traded. Buyer now desires to exercise the Warrants. After such exercise, Buyer will hold approximately 36.5 million shares of Common Stock in total, the fair market value of which may exceed $59.8 million.

The Common Stock and Warrants were issued in 2003 to various creditors of the Company in connection with the Company's emergence from bankruptcy, as part of its plan of reorganization. During 2004 and 2005, Buyer acquired approximately 4.2 million shares of Common Stock and 150,000 Warrants in separate open market private transactions.

In May 2006, Buyer acquired an additional 16.8 million shares of Common Stock and 21.0 million Warrants from four outside stockholders (and former creditors) of the Company in a privately negotiated transaction (the "May 2006 Acquisition"). Also as part of the May 2006 Acquisition, Buyer acquired 1.3 million shares of Common Stock from certain officers of the Company and 600,000 shares of Common Stock from certain former directors of the Company.

In April 2007, Buyer sold approximately 4.5 million shares of Common Stock and 4.2 million Warrants to an affiliated third party, the ultimate parent entity of which is different from that of Buyer. The transfer to the affiliated third party was made for business reasons in accordance with the investment policies of Buyer and the third party transferee.

In May 2007, certain officers of the Company exercised a put right arising from the May 2006 Acquisition and, as a result, in June 2007, Buyer and the affiliated third party acquired approximately 1.3 million additional shares of Common Stock (the "Put Shares").

Conclusions

You agree that there is no HSR reportable event arising from the exercise of the Warrants held by Buyer. Specifically, you confirmed the following:

1) The May 2006 Acquisition of Common Stock and Warrants was not a reportable transaction

6

under the HSR Act because the aggregate value of the voting securities held by Buyer did not exceed $56.7 million. Under 16 C.F.R. § 801.15, the aggregate value of voting securities does not include the value of voting securities, the acquisition of which was exempt at the time of acquisition under 16 C.F.R. §802.31, or the present acquisition of which is exempt under 16 C.F.R. §802.31. The acquisition of the Warrants was exempt from the requirements of the HSR Act under 16 C.F.R. § 802.31 because the Warrants are "convertible voting securities." The fair market value of the Common Stock held by Buyer prior to the May 2006 Acquisition, plus the acquisition price of the shares of Common Stock acquired in the May 2006 Acquisition, was less than $56.7 million.

2) The exercise of the Warrants will not be a reportable transaction under the HSR Act. The current fair market value of the Common Stock held by Buyer is approximately $29 million. The acquisition price of the Common Stock acquired upon exercise of the Warrants is the exercise price of $0.01 per share and there is no aggregation, for HSR Act purposes, of the exercise price with the amount paid for the Warrants, the fair market value of the warrants, a value attributable to the surrender of the Warrants or any other measure. Accordingly, under 16 C.F.R. §801.13, because the Common Stock is not publicly traded, the aggregate value of the voting securities held by Buyer following the exercise of the Warrants will be equal to the fair market value of the Common Stock held prior to the exercise of the Warrants (approximately $29 million), plus the acquisition price of the Common Stock acquired upon exercise of the Warrants (approximately $169,000 based on the $0.01 exercise price) (collectively, the "Aggregate Share Value"). Based on the foregoing, the Aggregate Share Value will be less than $59.8 million. As a result, the exercise of the Warrants is not reportable under the HSR Act.

3) Buyer's acquisition of the Common Stock and the Warrants between 2004 and the present, including the May 2006 Acquisition and the acquisition of the Put Shares, as well as its planned exercise of the Warrants are not a plan or device to avoid the obligations of the HSR Act under 16 C.F.R. §801.90. As discussed above, the Common Stock and the Warrants were originally issued to creditors of the Company in connection with its plan of reorganization. The exercise price of the Warrants was set at that time with the approval of the Bankruptcy Court and had no relationship to Buyer's acquisition of the Warrants.

Please let me know as soon as possible if you disagree with any of the conclusions above, or if I have misunderstood any aspect of your advice. Thank you for your assistance and attention to this matter.

AGREE
6/5/07

[redacted]

email: [redacted]

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Pursuant to Treasury Regulations (Circular 230), we are required to inform you that, unless expressly stated otherwise in writing, any United States federal tax advice contained in this communication

[redacted]

802.2

[redacted]

June 6, 2007

VIA E-MAIL

B. Michael Verne
Federal Trade Commission
Premerger Notification Office
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Hart-Scott-Rodino Informal Interpretation

Dear Mike:

Thank you for taking the time to speak with me yesterday. I wanted to confirm that I correctly understand the PNO's position with respect to the exempt status of cold storage warehouses in the context of the acquisition of a cold storage business. In our call I presented you with the following facts:

> Company A, which is in the cold storage business, intends to acquire the cold storage and related businesses of Company B. The transaction will be structured as the acquisition by Company A of all of the interests in an unincorporated entity. Company A will acquire the entire business of Company B. Among the assets of Company B are several cold storage warehouses, and related assets, that are used in Company B's cold storage business.

Presented with these facts, you confirmed that it is the PNO's position that the acquisition of cold storage warehouses is exempt from Hart-Scott filing requirements pursuant to the warehouse exemption in 16 C.F.R. § 802.2(h), notwithstanding the "exception" in that section, which provides that a warehouse acquisition is not exempt "when the . . . warehouse is to be acquired in an acquisition of a business conducted on the real property." You confirmed that the warehouse exemption would apply to the warehouses themselves and to any assets incidental to the warehouses (such as refrigeration equipment, and equipment such as forklifts or pallets used in the warehouse). However, the exemption would not apply to any assets that were not incidental to the warehouses. An example of such nonexempt assets would be trade names or marks, and associated goodwill. With respect to how to calculate the fair market value of the non-exempt portion of the business, you confirmed that the PNO does not require the purchaser to use any particular valuation method, only that the fair market value be determined in good faith.

[redacted]

[redacted]

Please let me know as soon as possible if I have misstated our conversation in any way. As always, thank you for your time and assistance.

Sincerely,

[redacted]

Agree
BM
6/6/07

is the right to assets upon dissolution only relevant if the right to profits is variable that is once profit allocation is determined the right to assets upon dissolution is not relevant. The example in the SBP describes the result if both a right to profits and a right to assets are variable. Under the first scenario it would be possible to have 4 UPE's two 50% investors with the right to profits and two different 50% investors with the rights to assets upon dissolution (similar to a corporation with 4 UPE's). I would think those situations would be highly unusual.

As always your guidance is appreciated.
Many thanks
[redacted]

****

[redacted]

Verne, B. Michael 801.1(b)

From: [redacted]
Sent: Monday, June 11, 2007 8:43 AM
To: Verne, B. Michael
Subject: Control test for LP/LLC's 801.1(b)(1)(ii)

Mike,
I have been hearing questions regarding the control test for LP/LLC's.

Rule 801.1(b)(1)(ii) defines "control" as

(b) Control. The term control (as used in the terms control(s), controlling, controlled by and under common control with) means:

(1) Either. (i) Holding 50 percent or more of the outstanding voting securities of an issuer or (ii) In the case of an unincorporated entity, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or

Examples: 2. A statutory limited partnership agreement provides as follows: The general partner "A" is entitled to 50 percent of the partnership profits, "B" is entitled to 40 percent of the profits and "C" is entitled to 10 percent of the profits. Upon dissolution, "B" is entitled to 75 percent of the partnership assets and "C" is entitled to 25 percent of those assets. All limited and general partners are entitled to vote on the following matters: the dissolution of the partnership, the transfer of assets not in the ordinary course of business, any change in the nature of the business, and the removal of the general partner. The interest of each partner is evidenced by an ownership certificate that is transferable under the terms of the partnership agreement and is subject to the Securities Act of 1933. For purposes of these rules, control of this partnership is determined by subparagraph (1)(ii) of this paragraph. Although partnership interests may be securities and have some voting rights attached to them, they do not entitle the owner of that interest to vote for a corporate "director" or "an individual exercising similar functions" as required by §801.1(f)(1) below. Thus control of a partnership is not determined on the basis of either subparagraph (1)(i) or (2) of this paragraph. Consequently, "A" is deemed to control the partnership because of its right to 50 percent of the partnership's profits. "B" is also deemed to control the partnership because it is entitled to 75 percent of the partnership's assets upon dissolution.

The SBP says

If the right to profits is variable and the right to assets upon dissolution is fixed, the right to 50 percent or more of the assets upon dissolution will be deemed to confer control. Conversely, if the right to assets upon dissolution is variable and the right to profits is fixed, the right to 50 percent or more of the profits will be deemed to confer control. In a situation where both the right to profits and assets upon dissolution are variable, control will be determined by applying the formula for determining rights to assets upon dissolution to the total assets of the unincorporated entity at the time of the acquisition, as if the entity were being dissolved at that time.

Please let me know if the control test is an "or" test, that is if both the rights to profits and the rights to assets upon dissolution are determined and investor A has the right to 50% or more of the profits and investor B has the right to 50% or more of the assets upon dissolution would there be two UPE's, or

8

Yes - if one partner has the right to 50% or more of the profits and another partner has the right to 50% or more of the assets on dissolution, there are two UPEs.

6/11/07

Verne, B. Michael 801.1(b)

From: [redacted]
Sent: Friday, June 08, 2007 1:16 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: 801.1(c)

Mike,

We are trying to determine the UPE of an acquired entity. A husband and wife hold voting securities of the target in their own name. They are also the settlors of seven trusts for the benefit of their children and grandchildren, which also hold voting securities of the target. If the trust shares and the settlors own shares are aggregated, the UPE will be the settlors. If they are not, the target is its own UPE.

The trusts are irrevocable with no reversionary interests. However, the settlors have the power to replace the trust property with other property of equivalent value. Meaning, they can remove the voting securities from the trust and replace them with other property of similar value. I believe that this makes the "irrevocable" trust more like the investment funds of 801.1(c)(6), thus, the securities are under the control of the settlors, giving them control of the target and making them the UPE of the target.

Can you confirm that this is correct? We have searched the new Premerger Manual and the informal opinions and found nothing on point with regards to the power to replace the corpus of the trust. Thanks and have a great weekend.

[redacted]

AGREE
B
6/8/07

9

802.9

Verne, B. Michael

From: [redacted]
Sent: Sunday, June 10, 2007 3:48 PM
To: Verne, B. Michael
Subject: Solely for purpose of investment

Mike,

I have a situation in which a Company A (a seller) will acquire share consideration in Target T that would otherwise trigger a filing but for application of the solely for the purpose of investment exemption. Company A will acquire less than 3% of the voting securities of Target T and its investment will be entirely passive.

Company A holds a 15% economic interest in Partnership P , but does not control Partnership P for HSR purposes. Partnership P holds a 5-7% interest in the voting securities of Target T and has representation on Target T's board of directors. It is likely that in respect of Target T, Company A and Partnership P will have aligned votes, but there is no agreement that they will vote their shares together.

Do we need to combine Company A and Partnership P's holdings in respect of Section 802.9 tests? If so, their combined holdings in Target T might be over 10% (it is unclear) and if the rules dictate that I must consider Company A and Partnership P to be acting together, then Partnership P's board rights would seem to convert Company A's investment from passive to active.

I am inclined to think I do not need to combine these two entities for the purposes of Section 802.9. Extrapolating from Interpretations 150 and 196, which are admittedly not exactly on point, it seem would that one does not need to combine when entities are "under common de facto control when the control tests are not satisfied."

Could you let me know whether you agree with my conclusion or need additional information in order to provide some guidance? As always, thanks for your help.

Craig

I AGREE THAT YOU DO NOT NEED TO COMBINE THESE TWO ENTITIES FOR PURPOSES OF 802.9

6/11/07

[redacted]

10

802.10

Verne, B. Michael

From: [redacted]
Sent: Tuesday, June 12, 2007 5:52 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: Request for Clarification - Applicability of HSR Act

Dear Mike,

I am writing to seek your advice about the following transaction:

Immediately prior to the relevant steps of the proposed transaction, the common stock of Company A will be held as follows: X, Y and Z will own, respectively, approximately 73%, 26% and 1% of the common stock of Company A.

1. X, Y and Z will contribute all of their shares of Company A to a newly-formed corporation (Newco) in exchange for a combination of notes, preferred stock, voting shares and non-voting shares of Newco. The various securities of Newco will not be issued to X, Y and Z on a pro-rata basis but, after this step, X will control Newco, which in turn will own 100% of Company A. Y will receive notes and non-voting stock of Newco and Z will receive only notes of Newco.

2. Newco will then merge with Company A and the shares of Newco will be exchanged for identical shares of the surviving entity except that Y will receive a voting preferred share of the surviving entity in exchange for its common stock of Newco.

3. After the preclosing steps outlined above, Q will acquire a minority interest of approximately 49% of the surviving entity with the result that none of X, Y, Z or Q will control the surviving entity for HSR purposes. We are separately considering the HSR implications of Q's acquisitions of shares of the surviving entity.

My specific questions are as follows:

1. Is the formation of Newco subject to §801.40 (even though it is in connection with a merger)?

2. If the formation of Newco is analyzed under §801.40, and the majority interest in Company A that is contributed by X can be excluded as to X under §802.30(c), is X's acquisition of voting securities of Newco exempt under §802.4 because the only remaining asset of Newco is a minority interest in Company A which can be disregarded when applying §802.4? X will continue to control the surviving entity after the merger, until step 3 above.

Please let me know your views.

Thank you in advance.

STEPS 1 & 2 ARE EXEMPT UNDER 802.10(b).
STEP 3 IS POTENTIALLY REPORTABLE

BM
6/12/07

IRS Circular 230 disclosure:
To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code

Steps 1 and 2 are exempt under Section 802.10(b). Step 3 is potentially reportable.

801.40

Verne, B. Michael

From: [redacted]
Sent: Wednesday, June 13, 2007 5:31 PM
To: Verne, B. Michael
Subject: RE: Consolidation, JV, 802.30

Another twist on the JV question, suppose corporation A has one shareholder who holds 50% or more of the voting securities, A1; corporation B does not have any 50% shareholders but it does have two entities with the present contractual right to appoint 50% of the Board, B1 and A1. So A1 controls corporation A through its ownership of voting securities and controls corporation B through its ability to appoint 50% or more the Board. A and B's shareholders are contributing all of their stock to Newco in exchange for NewCo stock and cash. Would A1 be exempt from any filing requirements based on its "control" of both A (voting securities) and B (contractual right)? If so would the only HSR be one filing by B1 in connection with its acquisition of interest in A, so it would only have to file to the extent that the value of interest in A? To determine that value would B subtract the value of B since it controls (contractual right)? Many thanks as always.

[redacted]

This is very complicated. A1 is not exempt outright. The reason is that the intraperson exemption does not include control through a contractual right to designate directors. You would have to do an 802.4 analysis. A1 is contributing more than 50% of the voting securities of A to Newco, so that leaves a minority interest that would not count toward A1's 802.4 limitation. A1 would then have to look at the assets held by B to determine if they include non-exempt assets valued in excess of $59.8 MM. If so, A1's acquisition of Newco voting securities is not exempt under 802.4. A would have to determine the fair market value of the Newco voting securities it is acquiring to determine if the size-of-transaction test is satisfied. That value would be based on all of the assets held by Newco and all of its liabilities. Presumably, since Newco holds all of the stock of A and B, the value of 100% of the voting securities of Newco would be equal to the FMV of all of the voting stock of A + all of the voting stock of B. A would then apply the percentage of Newco voting securities it will hold to that amount.

Similarly B1 would have to do the same analysis. B1 would have to look at the value of all of the non-exempt assets held by both A and B. If that amount exceeds $59.8 MM, B1's acquisition of Newco voting securities is not exempt under 802.4. It would value its acquisition as above. Any other shareholders of A or B would analyze their acquisitions the same way as B1.

B
6/15/07

801.40

Verne, B. Michael

From: [redacted]
Sent: Thursday, June 14, 2007 6:23 AM
To: Verne, B. Michael
Subject: RE: Consolidation, JV,

Mike, hopefully my last question on this transaction. Here the shares of A and the shares of B are being contributed to a NewCo in exchange for NewCo stock and cash. A has one 50% shareholder, A1 (so one UPE), B has two entities each with the right to appoint 50% of the Board (two UPE's, one A1 and B1), so A1 is UPE of both. NewCo will be its own UPE (so far should be same as below).

Questions:

1. Minority shareholders - With respect to the minority shareholders is it correct that they would only have a filing obligation to the extent they received NewCo stock valued at 59.8 million or more?

2. The value of the NewCo stock for the A shareholders would be equal to the value of the B shares they will hold through their holding in NewCo, not to include the value of their previously held A shares, and the same for B only what they will hold in A.

3. Of course if this were a Newco LLC or a LP there wouldn't be an HSR filing because Newco would be its own UPE.

4. If an entity has control through the ability to appoint 50% of the Board is the same as control through share/profit/asset ownership, that is the information will always be the same on its form as if it was a shareholder, it is entitled to the intraperson exemption and treated the same in every way so if it just had control through appointment and acquired the entity no HSR.

Many thanks as always.
[redacted]

1. Yes
2. No - see answer to previous inquiry.
3. Correct
4. You would report on the form anything he controls, no matter how he controls it. The intraperson exemption does not extend to control through the contractual right to designate directors.

Bruce
6/15/07

[redacted]

802.2

FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE
2007 JUN 20 PM 12:07

June 14, 2007

VIA E-MAIL AND U.S. MAIL

Michael Verne, Esq.
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Dear Michael:

I am writing to confirm our telephone conversations and messages of June 11 and 12.

As we discussed, Company A proposes to acquire 100% of the stock of four separate issuers (collectively, "Company B"). All four issuers are directly or indirectly owned by the same UPE. We are assuming for purposes of this letter that the size of the parties test is satisfied. Company B operates two resorts, whose facilities include hotels (the "Hotels"), extensive ski facilities and other recreational facilities, such as golf courses. Company B's assets also include undeveloped land, which has been zoned residential (the "Excluded Land"). The total purchase price for the stock of Company B is in excess of $59.8 million.

Company A will immediately, after closing on the acquisition of the stock of Company B, sell all of the assets of Company B, except for the Excluded Land, to Company C. Company C is a REIT.

The fair market value of the Hotels and the Excluded Land is such that, if such assets are exempt assets for HSR purposes, the fair market value of the non-exempt assets of Company B is less than $59.8 million.

As noted above, the Excluded Land is zoned residential. Company A is retaining the Excluded Land with the intent to develop it as residential properties. Detailed plans have been prepared to develop the Excluded Land as residential properties. Permits to actually begin construction have not, however, been issued.

[redacted]

[redacted]

You advised us that, assuming the fair market value determinations above are reasonable and determined in good faith pursuant to § 801.10(c), Company A's acquisition of the stock of Company B is exempt from the filing requirements of the HSR Act under 16 C.F.R. § 802.4. Specifically, the Hotels are an exempt asset under § 802.2(e) and the "Excluded Land" is exempt residential property under § 802.2(d).

Thank you for your consideration of this matter. If my understanding is in any way inaccurate, please contact me at your earliest convenience.

Very truly yours,

[redacted]

[redacted]

Agree -
B
6/14/07

[redacted]

Verne, B. Michael 801.11

From: [redacted]
Sent: Friday, June 15, 2007 4:25 PM
To: Verne, B. Michael
Subject: Request for Informal Interpretation - sec. 801.11 and Interpretation 76

Dear Mr. Verne,

Thank you for taking the time to discuss this transaction with me over the phone yesterday. I am sending this email to confirm in writing our discussion and the conclusion that the described transaction is not reportable under the HSR Act and its rules. While our discussion focused on the reportability of the two acquisitions, I have included the details regarding the other steps of the transaction which we covered briefly on the phone.

We would appreciate your confirmation of the analysis described below regarding the application of Secs. 801.11(e), 801.11(b) and Interpretation 76 (Premerger Notification Practice Manual, Fourth Edition).

The proposed transaction involves several steps each of which requires an HSR determination. The transaction agreements set forth the sequence of three steps, however, the third and final step is the simultaneous occurrence of three financing transactions and two acquisitions. We have concluded that there is no reportable transaction. Below is the step by step analysis.

1) Share Exchange: Founding shareholders of Investment Company will exchange their shares in Investment Company for shares of Shell Corporation making Investment Company a wholly-owned subsidiary of Shell Corporation. The value of the Shell Corp. shares is approximately $8 million valued at the IPO Price (described below).

HSR Analysis: This is not a reportable transaction because the value does not meet the $59.8 million HSR reporting threshold.

2) Assignment: Investment Company will assign certain rights and obligations to engage in the acquisitions described below to Shell Corp.

HSR Analysis: This is not a reportable transaction because the assignment at issue is not an acquisition of voting securities or assets.

3) Financing & Acquisitions (all set to occur simultaneously on the same closing date).

a) Private Investment: A single investor will pay $50 million cash for Shell Corp. preferred stock (approx. 81%) and common stock (12%). In addition, Private Investor will purchase certain warrants at set exercise rates, however, these will not be exercised until a future date not set. The terms of the preferred stock provide that while the Private Investor holds more than 50% of the preferred, the Private Investor will be able to appoint less than the majority of the Board of Directors until regulatory approval is achieved. Once regulatory approval is granted, if Private Investor holds more than 50% of the preferred stock, it will be able to appoint a majority of Shell Corp's directors.

HSR Analysis: This transaction is not reportable because it is under the $59.8 million threshold for HSR. The acquisition of warrants is not reportable because warrants are not voting securities for

15

HSR purposes. Exercise of the warrants may be reportable at the time they are exercised. In addition, for HSR purposes, Private Investor is not acquiring 50% of Shell Corp.'s voting securities nor does Private Investor acquire "control" under sec. 801.1(b)(1). Private Investor will not have the power to appoint 50% or more of the directors until after regulatory approval is achieved. Once regulatory approval is granted, then Private Investor may, depending on its holdings at that time, obtain "control" and become the UPE of Shell Corp.

b) Other Private Investors: Other private investors will pay $30 million cash for Shell Corp. preferred stock (approx. 19%) and common stock (16.6%). In addition, Other Private Investors will purchase certain warrants at set exercise rates, however, these will not be exercised until a future date not set.

HSR Analysis: This is not a reportable transaction because it is under the $59.8 million threshold for HSR. The acquisition of warrants is not reportable because warrants are not voting securities for HSR purposes.

c) IPO: Shell Corp. will sell on a public exchange approximately 2,000,000 shares of common stock valued at $5.00/share (the "IPO Price") raising $10,000,000. The total stock acquisition is for approximately 7.4% of the common stock.

HSR Analysis: This is not a reportable transaction because it is under the $59.8 million threshold for HSR.

d) Acquisition #1: Shell Corp. will acquire 100% of the voting securities/interests of LLC in exchange for approximately $125 million in cash and Shell Corp. stock. The cash portion is $60.1 million and includes cash to be used to pay off certain debts of LLC. The stock portion is $65 million. Shell Corp. does not have a regularly prepared balance sheet, therefore, under sec. 801.11(e)(1), the size of Shell Corp. is its assets less cash used to fund the acquisition (all funds exhausted as a result of the transaction), including debt repaid to lenders (March 18, 2005 Informal Staff Opinion 0503014, available at www.ftc.gov/bc/hasr/informal/opinons/0503014.htm <file://www.ftc.gov/bc/hasr/informal/opinons/0503014.htm>). Therefore, Shell Corp.'s assets are $90 million (the cash raised from all the investments described above) less $60.1 million (the cash used to fund this acquisition and the debt payment), or $29.9 million. LLC has assets of $33 million and revenues of $72 million. Parent 1 holds 51% of LLC's interests and Parent 2 holds 84% of the interests of Parent 1. Parent 2 has consolidated assets of less than $119.6 million.

HSR Analysis: This is not a reportable transaction because the size of the parties test is not satisfied. There is no $119.6 million person.

e) Acquisition #2: Shell Corp. will acquire 100% of the voting securities of X Corp. in exchange for approximately $23 million in cash and Shell Corp. stock. The cash portion is $10.1 million. The stock portion is $12.9 million.

HSR Analysis: This is not a reportable transaction because the size of the transaction is below the $59.8 million threshold.

Analysis of Other Possible Sequence

Informal Interpretation 76 (Premerger Notification Practice Manual, Fourth Edition) states that if the parties do not spell out the sequence of the transactions, the PNO advises that the parties analyze transactions in all possible sequences. Here, the parties have spelled out the sequence only as to the order between the Share Exchange, the Assignment, and the Financing/Acquisitions. The

financing and acquisitions described above are scheduled to occur simultaneously, therefore we must look at the issue of reportability under all possible sequences. However, as we discussed on the telephone, logically, it doesn't make sense to conduct the analysis with the financing occurring after the acquisitions, so the only other sequence involves the acquisition of X Corp. prior to the acquisition of LLC, the reverse of the order described above.

Acquisition of X Corp. The analysis for the acquisition of X Corp. does not change with reversal of the order of the acquisitions. It is not a reportable transaction because it is below the $59.8 million reporting threshold.

Acquisition of LLC. The analysis for the acquisition of LLC does change, however the conclusion remains the same. The transaction is above the $59.8 million threshold, however, the size of the parties test is not met. Shell Corp. has acquired X Corp. which has a regularly prepared balance sheet, therefore, its size is calculated under sec. 801.11(b) to include the assets of X Corp. and the assets of Shell Corp. X Corp. has assets of $4.4 million. Shell Corp.'s only other assets are the cash raised during financing ($90 million) less that used to acquire X Corp. ($10.1 million), or $79.9 million. Shell Corp.'s total size, therefore, is $84.3 million. As stated above, LLC is not a $119.6 million person. The acquisition of LLC, therefore, is not reportable because without a $119.6 million person, the size of the parties test is not met.

Please let us know if you concur with this analysis.

Thank you.

[redacted]

Agree
6/15/07

[redacted]

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[redacted] Circular 230 Notice: To ensure compliance with IRS requirements, we inform you that any U.S. federal tax advice contained in this communication is not intended or written to be used, and cannot be used by any taxpayer, for the purpose of avoiding any federal tax penalties. Any legal advice expressed in this message is being delivered to you solely for your use in connection with the matters addressed herein and may not be relied upon by any other person or entity or used for any other purpose without our prior written consent.
The information in this e-mail (including attachments, if any) is considered confidential and is intended only for the recipient(s) listed above. Any review, use, disclosure, distribution or copying of this e-mail is prohibited except by or on behalf of the intended recipient. If you have received this email in error, please notify me immediately by reply email, delete this email, and do not disclose its contents to anyone. Thank you.

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801.10 Agree – MV concurs

Walsh, Kathryn

From: [redacted]

Sent: Tuesday, June 19, 2007 4:03 PM
To: Walsh, Kathryn
Cc: [redacted]
Subject: HSR Question on Valuation - Size of Transaction

Kate - Thanks for fielding our recent calls and for your guidance.
Here is a statement of the facts we discussed with you.
In broad brush, the ultimate objective of the overall transaction is to distribute cash out of an existing business to its current owners and to sell an interest in the business to a new investor group (the "Investors").

As currently proposed, the elements of the greater transaction and the manner in which it would unfold are as follows:

1. The business is now owned and operated by a corporation (the "Corporation").
2. The Corporation will form a limited liability company (the "LLC"). All of the member interests of the LLC will be owned initially by the Corporation.
3. After the formation of the LLC, the Corporation will transfer all of its assets, subject to all of its liabilities, to the LLC. In addition, the LLC will sell enough of its member interests to the existing shareholders of the Corporation (the "Shareholders") so that the Shareholders will hold 1% of the LLC's member interests. The Corporation will hold the other 99%.
4. The LLC will then borrow $41.3 million from a third-party (presumably a bank or other financial institution) that is not affiliated with the Shareholders, the Corporation, the LLC or the Investors (the "Lender"). The proceeds of the loan will be distributed by the LLC to the Corporation and the Shareholders in proportion to their member interests in the LLC. It is expected that the Corporation and the Shareholders will not be permitted to distribute or use those funds unless the Investors make their intended investment described below. It is also expected that the loan will initially be secured by a pledge of the distributed funds. The loan will not be guarantied by the Investors, nor secured by assets of the Investors. The Investors will take the lead in identifying and interviewing potential lenders for the LLC, developing a term sheet and negotiating proposed terms. The LLC, however, will have sole responsibility for approving the Lender and the loan and settling upon loan terms. (Note that instead of an interim loan followed by a replacement loan, it is now more probable the two loans will be combined into one set of loan documentation from one lender with the loan initially having a short maturity (the interim component) which will then convert into a long maturity (the replacement component) if the Investors, in fact, purchase the Class A Shares as planned -- although two separate loans (an interim loan followed by a replacement loan), perhaps from two different lenders, is still a possibility.)
5. The operating agreement of the LLC will be restated to create three classes of "shares" with varying voting and economic rights. Initially, all of the Class A shares will be held by the Corporation. Those Class A shares will entitle the Corporation to greater than 50% of the profits of the LLC or greater than 50% of the assets of the LLC upon dissolution.
6. At the ultimate closing, (a) the Investors will purchase all of the Class A Shares from the Corporation for (i) approximately $23 million paid currently and (ii) the future obligation to pay the members of the LLC their pro rata portions of an additional payment geared to the financial performance of the LLC over the year following the closing (the "Earnout") and (b) thereupon the recipients of the LLC's prior $41.3 distribution (from the loan proceeds) will be free to use those moneys.
7. The Earnout will not exceed $21.5 million. The Investors will be obligated to pay over to the Corporation the portion of the Earnout they are entitled to receive as a consequence of holding the Class A shares.
8. In one way or another, each element of the overall transaction will be subject to or contingent upon the others.
9. We have assumed for purposes of the analysis that the size-of-the-parties test will be met.

We would be grateful if you would confirm for us your conclusion that under the foregoing facts the $41.3 million borrowing and distribution by the LLC would not be included in the consideration being paid for the Investors' acquisition of the Class A Shares and that, accordingly, the size-of-the-transaction threshold would not be met since the total consideration could not exceed $44.5 million (the $23 million paid at closing plus a maximum possible earnout of $21.5 million).

Kind regards,
[redacted]

16

federal tax law.

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[redacted]

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801.2

Verne, B. Michael

From: [redacted]
Sent: Wednesday, June 20, 2007 12:18 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: HSR Question

Mike,

Our client has licensed a pharmaceutical compound that we believe is nonexclusive and nonreportable and wanted to receive your input. The license grants the licensee the right to research, develop and commercialize a compound within the US. The license also grants the licensee exclusive rights to use the active pharmaceutical ingredient to manufacture the finished product within the US, but the licensor retains the right to manufacture the active pharmaceutical ingredient. For reasons unknown to our client, the licensor insisted that it retain manufacturing rights over the active pharmaceutical ingredient. The license agreement provides that the licensee shall manufacture the active ingredient as a subcontractor for the licensor and the licensor will manufacture additional amounts of the active ingredient once the licensee's requirements exceed certain volume thresholds.

We concluded that the licensor's retention of manufacturing rights for the product's active ingredient renders the agreement to be nonexclusive under HSR rules and informal interpretations and, thus, there is no reportable asset acquisition. Do you agree?

Thanks,
[redacted]

Agree
BVM
6/20/07

[redacted]

For more information about [redacted] click here:
[redacted]

802.4
802.50

Verne, B. Michael

From: [redacted]
Sent: Friday, June 22, 2007 2:06 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: HSR - 802.4 and 802.50 analysis question

Hi Mike,

I'm working through an exemption analysis involving 802.4 (the "look-through") and 802.50 (the foreign assets exemption) and hope that you can provide a bit of clarity on "sales in or into the US" (and the "attribution" language in the examples to 802.50) for purposes of the foreign assets exemption. The transaction I'm being asked to analyze is actually a stock deal, but it doesn't meet the strict terms of 802.51 and, so, we are assessing the availability of the foreign assets exemption by virtue of the look-through.

The buyer (my firm's client) is a US issuer and the target is a foreign issuer ("S"). The majority of S's assets (manufacturing/processing facilities) are located outside of the US. S also has a some US assets (same general types of facilities).

Regarding the calculation of sales from S's non-US operations "in or into the US," our question relates to how to value intracompany sales. Some of S's sales into the US are made by S to a wholly owned US subsidiary of S ("SUSA"). S accounts for these sales in its regularly kept accounting records at a transfer price (based on S's cost of production) paid by SUSA at the time of the intracompany sale. The majority of the products S sells to SUSA are raw materials that SUSA further processes before resale, and the remainder are goods for which little or no additional processing occurs. In either case, SUSA typically holds these products in inventory for some period of time before they are resold in the US.

There is no express agreement between S and SUSA on where title to the products transfers, but we are assuming for purposes of our analysis that it transfers in the US.

In calculating the value of sales by S to SUSA, it appears to us that the sales should be valued at the intracompany transfer price paid by SUSA at the time of sale, and that the valuation should not be dependent on the price at which SUSA later sells the products to its customers. Among the reasons for this are: (a) some of the products sold intracompany are further processed in the US prior to resale; (b) SUSA holds most of these products in inventory, meaning that intracompany sales in one fiscal year do not necessarily result in resales in the same fiscal year; and (c) this is how S records the sales on its books and records.

I would appreciate it if you could confirm the above analysis is correct. If you'd like to discuss any of these points, please call either my colleague [redacted] office number) or, if he's not available, me ([redacted], cell number).

Thanks in advance for your help, Mike.

I AGREE WITH THE ANALYSIS.
B
6/22/07

Regards,

[redacted]

Verne, B. Michael

From: [redacted]
Sent: Monday, June 25, 2007 11:53 AM
To: Verne, B. Michael
Subject: Item 4(c)

Hi Mike.

We need your assistance in determining whether certain types of documents are responsive to Item 4(c). We represent A, an entity that will be acquired by B. The parties have been talking for months so we have a large volume of documents to review for 4c. Please assume that all of the documents described below were drafted in connection with the transaction and can be found in the files of officers and/or directors of A. Please also assume that the only potential 4(c) content in each of the documents described below is the content described below.

(1) A document that simply states that A should buy X and Y and then ask for more money from B when B buys A. (Note that X and Y compete with A but the document does not discuss this.) NO

(2) A document in which A states that if news of its NDA with B leaked, A's prospective customers in the market could postpone making a decision about A and A's employees could wonder about their future. NO

(3) A document between A and B in which B states that it is not sure how long the HSR due diligence and HSR filings would take, but wants to make sure they are done right. NO

(4) A due diligence request list from B to A states the following. Please provide revenue by specific channels and then the question lists the channels such as internet, etc... Another question states please provide revenues by sales type and then lists the sales types based on type of end user. Answers to these questions are not provided in the document. NO

(5) Another due diligence list from B to A requests that A provide details of its recent customer losses and then the question lists as examples specific customers lost by A. No answers are provided in the document. NO

(6) A director of A sends an e-mail in which he describes competition in general terms in A's industry and then notes that his general observations are intended to be a guide as A deliberates on its future and negotiates with prospective purchasers. Neither B nor any other prospective purchaser is named. However, the e-mail was sent during the time in which A was considering doing a deal with B. YES

(7) Documents that discuss only the likelihood and timing of HSR approval. NO

(8) A spreadsheet prepared as part of due diligence shows A's contractual commitments for product enhancements in the future. NO

(9) Would executed employee non-compete agreements be responsive? NO

(10) Could disclosure schedules be responsive if they contain information on when certain of A's customer contracts terminate in the future or when A's product enhancements will be introduced in the future? NO

(11) We understand that transcribed voice mail messages could possibly be 4(c) responsive. We assume this is not the case if the voice mail messages have not been transcribed. Is this correct? YES

Thanks for your help Mike.

Best regards,

B Verne
6/26/07

801.10
802.4

Verne, B. Michael

From: [redacted]
Sent: Wednesday, June 27, 2007 9:47 AM
To: Verne, B. Michael
Subject: HSR Questions

Mr. Verne,

I would like to confirm our analysis on two unrelated transactions.

Transaction 1

Limited Partnership A ("A") is acquiring 100% of the voting stock of Target Corporation ("Company") through: (i) the acquisition of 15% of the voting stock of Company directly from management individuals; and (ii) the acquisition of 100% of the membership interest of Limited Liability Company B ("B") which in turn directly holds 85% of the voting stock of Company. B does not hold any other assets other than its interest in Company. Assume the size-of-person thresholds are met. For HSR purposes, the UPE of Company is a natural person who holds 100% of the membership interest of B.

A is paying a total of $33 million cash for the securities to be acquired in this acquisition of Company. A is also paying off $100 million of Company's debt.

Question: Do we include the $100 million debt payoff in calculating the size of transaction?

Although we are directly acquiring both voting stock of Company and B's LLC membership interest, since B's only asset is Company, can we look through B directly to Company and treat this as an acquisition of voting stock in which case we do not include the debt?

Transaction 2

Adult siblings A, B, C and D each directly own: (i) 25% of Corporation X ("X"); 25% of Corporation Y ("Y"); and 25% of Corporation Z ("Z"). Therefore X, Y and Z are each their own UPEs for HSR purposes.

Newco LLC ("Newco") is being formed by X, Y, and Z each contributing all of their assets in exchange for membership interest in Newco. As a result, Z will hold 70% of the membership interest of Newco (based on the greater value of the assets it contributed) and X and Y will hold the remaining 30%. X, Y, and Z are still each held 25% by A, B, C and D.

Newco was formed for the purpose of forming a JV with another entity. The formation of the JV is HSR reportable and HSR notifications will be submitted for the JV formation.

Question: Is the formation of Newco exempt under 7a(c)(10) and/or 802.30?

Although Z acquired a controlling interest in Newco, this is really just a re-organization and consolidation

of the assets of X, Y and Z, which remain held in the same proportions by A, B, C and D, for ease of entering into the JV.

Please let me know if you need additional information on either of these transactions. Your assistance is appreciated.

Thank you,
[redacted]

[redacted]

Transaction 1 - Do not include the debt. The size-of-transaction is $33 MM.

Transaction 2 - The transaction would not be exempt under (c)(10) or 802.30. Z's acquisition of 70% of Newco LLC may be exempt under 802.4. Z can exclude the value of its assets in the 802.4 analysis, so Z would only be looking at the value of the assets contributed by X and Y in determining if the Newco has non-exempt assets valued at $59.6 million or greater. Any exempt assets contributed by X and Y (e.g. cash, cash equivalents, etc. can also be excluded).

BM
6/27/07

802.4

Verne, B. Michael

From: [redacted]
Sent: Wednesday, June 27, 2007 2:59 PM
To: Verne, B. Michael
Subject: LLC Formation Question

Dear Mike:

I have a question in the context of the formation of an LLC. In my view, no HSR filing is required in the following circumstance.

Facts:

"A" and "B" form a 50/50 joint venture LLC. They each commit to contribute $60.2 million to the venture. "A"'s contribution consists entirely of cash. "B"'s contribution consists of barges, to be used by the LLC in its ordinary course of business. B contributes (i) slightly used barges valued at $58.3 million and (ii) contracts for the delivery by the manufacturer of brand new barges to the LLC valued at $2.5 million.

Analysis:

"A" and "B" are both acquiring persons, 801.50(a). As each acquires a controlling (50%) non-corporate interest valued at more than $59.7 million, "A" and "B" must determine if the exemption in 802.4 is applicable to their acquisitions.

(1) In the case of "B", the barges are exempt as intra-person transfers, 802.30(c). The cash contributed by "A" is exempt under 801.21(a). As a result, from "B"'s point of view, the LLC does not hold non-exempt assets with an aggregate fair market value of more than $59.7 million. (In fact, all of the LLC's assets are exempt.) No filing is required for "B".

(2) In the case of "A", the cash contributed by "A" is exempt under 801.21(a). As "A" cannot avail itself of 802.30(c) with respect to the barges, the question whether the barges are exempt assets turns on 802.1. For purposes of this analysis, let's assume that the "used" barges are not exempt assets under 802.1(d). However, the contracts to acquire new barges, in my view, come under 802.1(b). As a result, the non-exempt assets are valued at $58.3 million, which is below the $59.7 million filing threshold. No filing is required for "A".

Please let me know if you agree with this assessment, in particular the treatment of the contracts to acquire new barges as exempt under 802.1(b).

Best regards,

[redacted]

AGREE -
B
6/27/07

21

801.1(b)

Verne, B. Michael

From: [redacted]
Sent: Friday, June 29, 2007 11:50 AM
To: Verne, B. Michael
Cc: [redacted]
Subject: Hart-Scott-Rodino Antitrust Improvements Act - UPE Question

Mike

Thank you for taking the time to speak with me and [redacted] last week. I am writing to confirm the advice you provided. The factual background that we discussed is set forth below as is the analysis.

Background

An existing limited liability company ("LLC A"), currently has a corporate ultimate parent entity that has the right to receive 50% or more of the profits and 50% or more of the assets upon dissolution ("Owner X"). A limited partnership is contemplating making an investment in LLC A ("Owner Y") and as a result of such investment, the equity ownership of LLC A would be reorganized such that Owner X would continue to own preferred membership interests in LLC A entitling it to receive upon the dissolution of LLC A or from future profits, the first $39.4 million plus an 8% accruing dividend on $31.4 million of such amount. Owner Y, as a result of such investment, would receive preferred membership interests entitling it to the next $27.0 million plus an 8% accruing dividend on such amount upon the dissolution of LLC A or from future profits, and would also receive common membership interests that would entitle it to share in profits and distributions of assets upon dissolution after the satisfaction of the payments in respect of the preferred membership interests. The common membership interests to be held by Owner Y would entitle it to 50% or more of the profits and 50% or more of the assets upon dissolution at such time as the amounts in respect of the preferred membership interests have been satisfied.
LLC A is anticipating acquiring assets from an unrelated business ("Target T") for an amount in excess of $59.8 million and less than $239.2 million (the "Acquisition"). Owner Y's investment in LLC A would occur immediately before the consummation of the Acquisition. We believe that irrespective of the identity of the ultimate parent entity of LLC A, both LLC A and Target T will satisfy the size of party test under the HSR Act.

Analysis

Issue: Is Owner X the ultimate parent entity of LLC A for purposes of the notification to be filed in respect of the Acquisition?

Based on informal staff opinion 0705023, dated May 30, 2007, we discussed with you that, to determine the ultimate parent entity of LLC A on a prospective basis giving effect to Owner Y's investment in LLC A and to analyze the equity ownership of LLC A as of the time of the Acquisition, the appropriate methodology to determine "control" pursuant to Rule 801.1(b) is to use LLC A's most recently regularly prepared balance sheet. Using that balance sheet, we should determine which person, if any, would have a right to receive 50% or more of the profits or 50% or more of the assets upon dissolution of LLC A based on the equity ownership that will exist immediately after Owner Y's investment in LLC A and at the time of the Acquisition. The regularly prepared balance sheet will be for a date that

2

precedes Owner Y's investment in LLC A. Due to Owner X's right to receive $39.4 million plus an 8% accruing dividend on $31.4 million of such amount before any other LLC A member would receive anything, and because the amounts payable to Owner X would exceed 50% of LLC A's net assets as reflected on LLC A's most recently regularly prepared balance sheet, Owner X will be LLC A's ultimate parent entity despite Owner Y's investment in LLC A and the prospect that, sometime in the future due to its common membership interests in LLC A, Owner Y might ultimately become entitled to receive 50% or more of LLC A's profits or assets upon dissolution.

Thank you again for your consideration and assistance in this matter. If you do not believe that this note reflects the facts discussed in our conversation or if I have misstated the advice you provided, please contact me at your earliest opportunity.

Thanks,

AGREE
BM
6/29/07

[redacted]

[redacted]

[redacted]

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[redacted]

18a (c)(2)

June 20, 2007

[redacted]

BY OVERNIGHT COURIER

Mr. James Ferkingstad
Premerger Notification Office
Federal Trade Commission
Room 303
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Categorization of Contract Loans For Purposes of Section 802.4

Dear Mr. Ferkingstad:

I am writing this letter to confirm oral advice you provided to [redacted] in a telephone conversation earlier today regarding the applicability to the following transaction of the notification requirements under the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (the "Act") and the Federal Trade Commission's implementing regulations (the "Rules").

Company A and Company B are mutual insurance companies, each of which meets the size of the parties jurisdictional requirements under the Act. Company A and Company B are contemplating entering into a transaction whereby Company A will merge into Company B.

In order to determine whether Section 802.4 of the Rules applies to this transaction, the parties will need to determine the fair market value of the assets of Company B. In order to do so, we need to know whether contract loans (described below) are included in or excluded from the definition of assets set forth in Section 801.21.

Contract loans are policy loans made by a mutual insurer to its policyholders, secured by the cash value credited to the policyholder (most whole life policies permit the policyholder to borrow against the cash value accumulated in the policy at favorable interest rates). Thus, contract loans are essentially secured debt, very similar to bonds and other assets identified in Section 7A(c)(2) of the Act and excluded from the determination of the assets acquired under Rule 801.21. Therefore, after our discussion, you confirmed that contract loans would be excluded from the definition of assets in Section 801.21.

Please contact me as soon as possible if the analysis set forth herein does not accurately reflect the informal advice you provided in our telephone conversation. I understand that you will write your

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comments on this letter and that it will subsequently be publicly available through requests under the Freedom of Information Act. Thank you for your assistance with this matter.

Very truly yours,

LORD, BISSELL & BROOK LLP

Agree
6/20/07

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